

1718229 (Migration) [2019] AATA 6775 (12 November 2019)

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DECISION RECORD

DIVISION:	Migration & Refugee Division
CASE NUMBER:	1718229
MEMBER:	Justin Owen
DATE:	12 November 2019
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Statement made on 12 November 2019 at 2:50pm

CATCHWORDS

MIGRATION – refusal – Partner (Temporary) (Class UK) visa – Subclass 820 –applicant had provided a bogus document – failed to meet PIC 4020– multiple false claims – breaching Australian immigration law – no compassionate or compelling circumstances – decision under review affirmed

LEGISLATION

Migration Act 1958, ss 5, 65, 375
Migration Regulations 1994, r 1.03, Schedule 2, cl 820.226

CASES

Arora v MIBP [2016] FCAFC 35
Batra v MIAC [2013] FCA 274
Kaur v MIBP [2017] FCAFC 184
Plaintiff M64/2015 v MIBP [2015] HCA 50.
Trivedi v MIBP [2014] FCAFC 42

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

3. This is an application for review of a decision made by a delegate of the Minister for Immigration on 8 August 2017 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
4. The delegate's decision record the applicant provided the Tribunal outlines the applicant's immigration history. The delegate noted that in paragraph 41 of the then Migration Review Tribunal's (MRT) decision record of 9 July 2014 the applicant stated that he first arrived in Australia in 1998 under a fraudulent travel document under the name [Name 1]. It also stated that the applicant admitted to the MRT that he departed Australia in 2005 utilising a false identity. On 21 June 2000 the applicant lodged a Protection visa application (subclass 785) that was refused on 31 August 2000 and the refusal affirmed by the then Refugee Review Tribunal on 11 April 2001. The decision record states that the applicant claimed in this application to have arrived in Australia [in] April 2000 as a stowaway person. The decision record states the applicant arrived in Australia [in] February 2012 on a Partner visa (subclass 100) that was granted on 6 January 2012. The decision record states the applicant departed Australia and returned twice before last arriving in Australia on [date] March 2013 on the subclass 100 Partner visa. The decision record states that on 27 March 2014 the applicant's subclass 100 Partner visa was cancelled because he had provided false and misleading information in his subclass 309/100 Partner visa application that had been lodged on 27 August 2010. The decision record points out that the applicant then sought a review with the then MRT which affirmed the Department's decision after review on 10 July 2014.
5. The applicant applied for the subclass 820/801 Partner visa – the subject of the Tribunal's current review - on 1 August 2014. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl.820.226 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because the applicant had not satisfied Public Interest Criteria 4020 ('PIC 4020'). The delegate found that the applicant had not satisfied PIC4020(1) as he had provided a bogus document, or false or misleading information in relation to an application another visa – a Subclass 309/100 Partner visa – that the applicant held in the twelve (12) months before making the current Subclass 820/801 Partner visa application. As the applicant lodged the Subclass 820/801 Partner visa application on 1 August 2014 and provided false and misleading information on a visa held in the 12 months before making this application, he did not meet PIC4020(1). The delegate noted that PIC4020(4) provided that PIC4020 would nonetheless be satisfied if the Minister was satisfied that there were compelling circumstances that affect the interests of Australia; or compassionate or compelling circumstances that affect the interests of an Australian citizen, Australian permanent resident or an eligible New Zealand citizen. The delegate however found that the extent of the fraud committed by the applicant and his attempts to deceive the Department outweighed any compelling circumstances he put forward for not applying PIC4020, or justified granting the visa. The delegate found that based on the evidence and information before him, he was not satisfied that there were any compelling and/or compassionate circumstances affecting the interests of Australia or the interests of an Australian citizen, Australian permanent resident or an eligible New Zealand citizen to justify granting the visa. The delegate found that the applicant failed to meet the provisions for a waiver as given under PIC4020(4). As the applicant failed to meet PIC4020(1) and there were no grounds to waive the requirements of PIC4020(1)(a) or (b), the delegate found the applicant did not satisfy PIC4020 and cl.820.226 was not met.

6. The applicant appeared before the Tribunal on 29 October 2019 to give evidence and present arguments. The Tribunal also received oral evidence from the applicant's [wife], the applicant's [daughter], the applicant's son [and] the applicant's [daughter-in-law]. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.
7. The applicant was represented in relation to the review by his registered migration agent. The applicant's registered migration agent attended the hearing.
8. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

9. **s.375A certificate**

10. At the hearing the Tribunal noted to the applicant that a certificate has been issued (D1, Folio. 201-205) by the Delegate under s.375A of the Migration Act 1958 purportedly restricting the Tribunal from disclosing certain information in the Departmental file [on] the basis that disclosure of the material would be contrary to the public interest for: *Folio. 201-205: Departmental job details report – contains information about investigations by the Department's officers. Disclosure may reveal the department's investigation methodology and may affect future capacity to obtain information using these methods.*
11. The Tribunal provided the applicant with a copy of the Certificate. The Tribunal informed the applicant that it considered the certificate to be invalid. The Tribunal noted that it considered the information in the folios was not what the certificate purported it to be and the folios did not reveal what the certificate claimed to reveal. The Tribunal noted furthermore the information in the folios related to issues pertaining to the various aliases of the applicant that were known to the applicant and covered extensively in the delegate's decision record the applicant had provided to the Tribunal. The Tribunal noted that release of the folios purportedly covered by the certificate would usually be prevented under s375A. The Tribunal stated, given it considered the certificate to be invalid, that it was prepared to disclose all folios purportedly covered by the s.375A certificate to the applicant. The Tribunal released all folios purportedly covered by the s.375A certificate to the applicant at the hearing. It invited the applicant through his representative to make any submissions on the validity of the certificate or make any comments. The applicant responded at the hearing and claimed one of the aliases listed in the report was not one he had previously utilised. The Tribunal has taken his submission into account in its decision.

CONSIDERATION OF CLAIMS AND EVIDENCE

12. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.820.226 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or

refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and

- the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
- neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).

13. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

14. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
15. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
16. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
17. The applicant provided the Tribunal with a copy of the delegate's decision record.
18. The applicant agreed that he had provided multiple false responses in his answers to questions in his Subclass 309/100 Partner visa application forms that had been lodged according to the delegate's decision record on 27 August 2010. The Tribunal notes from the decision record that the applicant's Subclass 100 Partner visa was cancelled as a result of his provision of false and misleading information on 27 March 2014. The cancellation was affirmed by the Tribunal on 10 July 2014.
19. At the hearing the Tribunal discussed with the applicant the delegate's decision record. The Tribunal noted the delegate's decision record stated the applicant agreed there had been non-compliance with the PIC4020 requirements. The applicant agreed that was the case.
20. The Tribunal discussed the applicant's responses to various questions in his Subclass 309/100 Partner visa application that the delegate found to be either false or misleading.

21. In response to the Tribunal's questions the applicant agreed with information in the decision record that he had arrived in Australia [in] August 2005 under the name and passport of [Name 2] and remained in Australia until [date] July 2010.
22. The Tribunal noted that the decision record the applicant provided stated that [Name 2] applied for several visas after his arrival in Australia including Protection and Bridging Visa Es. The applicant agreed that he had been the person that had lodged those applications.
23. The applicant agreed that, as outlined in the delegate's decision record, that his answer to question 7 in his Form 47SP of NO to the question 'Have you ever held or do you currently hold a Bridging Visa E' was false.
24. The Tribunal noted that in question 7 of the Form 47SP the applicant was asked 'Have you or any dependent family member, previously been to Australia, held or currently hold a visa for travel in Australia.' The applicant had responded YES and only recorded the names [applicant name] ([Name 1], stated his purpose of stay was visiting and his arrival was 1998. The applicant agreed that his response was false.
25. The Tribunal noted in question 14 of the Form 47SP which asked 'Other names you are, or have been known by (including names, aliases) the applicant only conceded the name '[Name 1]'. The Tribunal asked if this was incorrect information and had the applicant utilised other names. The applicant agreed that his response was incorrect. The Tribunal notes that the applicant also arrived and departed Australia under the identity [Name 2] in 2005 and 2010 respectively. The applicant conceded in his oral testimony that he returned to Australia in August 2005 under the name and identity [Name 2].
26. The Tribunal noted from the decision record the applicant provided that in Form 80 of his Subclass 309/100 Partner visa application that when asked about other names he was, or have been known as, he had only recorded the name '[Name 1]'. The Tribunal asked the applicant if this was false. The applicant agreed it was.
27. The Tribunal asked the applicant about Question 21 of Form 80 where the applicant had claimed he lived in China in an address at Fujian Province from June 2005 until currently, that meaning the time of the visa application on 27 August 2010. The Tribunal asked if the residential history he provided in his Form 80 was false. The applicant conceded it was incorrect from 2005. The Tribunal notes from information in the delegate's decision record that the applicant was in Australia between 2005 and 2010.
28. The Tribunal asked the applicant about Question 23 of Form 80 where the applicant had claimed he worked in China from 2005 until currently (being the time of the lodgement of the visa application application on 27 August 2010) as a [Occupation 1]. The Tribunal asked if the employment history he provided in his Form 80 was false. The applicant conceded it was partly false and misleading. The Tribunal notes from information in the delegate's decision record that the applicant was in Australia between 2005 and 2010 so could not have been working as a [Occupation 1] in China between 2005 and 2010.
29. The Tribunal asked the applicant about Question 25 of Form 80 where the applicant when asked to provide all details of previous visits to Australia responded 1998 to June 2005, stated his type of entry was Visitor, the purpose of his visit was vising and his name used was [Name 1]. The Tribunal asked if this information was false. The applicant agreed it was.
30. In the delegate's decision record the applicant provided the Tribunal it was noted that on 22 March 2011 the applicant had been interviewed by Departmental officers. The Tribunal raised the interview with the applicant at the hearing. The Tribunal noted that the decision

record stated a record was made of the applicant's responses to questions at the interview. The decision record stated that it was recorded the applicant stated that he arrived in Australia on a false document apart from his wife and family. The applicant also stated he returned to China in 2005. The Tribunal asked the applicant if his response had been untrue. The applicant agreed it had been false.

31. The Tribunal asked the applicant what visas he had applied for under the false identity [Name 2]. The Tribunal noted the decision record stated he had applied for Protection as well as a Bridging Visa E. The applicant agreed he had done so under this false name and added he also applied for a Business visa.
32. The Tribunal asked the applicant why he failed to supply the correct information in his Subclass 309/100 Partner visa application and if he were aware of the consequences of non-compliance. The applicant stated he did not know much about immigration law and didn't realise he was breaking the law. The Tribunal does not accept the applicant's response. The Tribunal notes the delinquent migration history of the applicant as outlined in the decision record that stretches back to 1998. On the evidence before the Tribunal the applicant has utilised at least two aliases to either depart or arrive in Australia. There is no evidence the applicant ever voluntarily informed the Department about the multiple false claims he made in his various migration applications until after the cancellation of his Subclass 309/100 Partner visa in March 2014. The Tribunal considers this evidence is relevant to its assessment whether there was an element of fraud or deception by the applicant which has attracted the operation of PIC 4020(1): *Trivedi v MIBP [2014] FCAFC 42*. The Tribunal considers the provision of false and misleading information to the Department in the applicant's Subclass 309/100 Partner visa application involved an element of fraud or deception on the part of the applicant.
33. The Tribunal notes that the applicant denied, as claimed in the delegate's decision record, that he departed Australia in July 2010 under the passport of [another name]. The Tribunal gives this particular matter no weight in its assessment.
34. The Tribunal finds the applicant has provided a bogus document or false or misleading information in relation to a visa that he held in the 12 months before making his 820/801 Partner visa application on multiple occasions. The Tribunal finds the evidence before it – and conceded by the applicant – of the provision of false and misleading information is substantial. The Tribunal notes the applicant has utilised false identities on multiple occasions whilst departing and returning to Australia.
35. Therefore, the applicant does not meet PIC 4020(1).

Should the requirements of PIC 4020(1) or (2) be waived?

36. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP [2017] FCAFC 184*.
37. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP [2015] HCA 50*. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.

38. For the following reasons, the Tribunal is not satisfied that the requirements should be waived.
39. The applicant did not submit any further written submissions concerning the exercise of the waiver to the Tribunal beyond copies of various bills, wage slips and medical correspondence. The Tribunal invited the applicant at the hearing to submit any compelling circumstances that affected the interests of Australia or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justified the granting of the visa.
40. The Tribunal noted at the hearing the applicant had previously made representations on such matters to the Department in July and August 2016.
41. The Tribunal noted that the applicant had submitted that the submission of adverse information in his subclass 309/100 visa was unintentional and claimed his first offshore Partner visa would have been granted if he had disclosed such information. The Tribunal invited the applicant to discuss such a claim. The applicant asked the Tribunal to forgive him for his previous actions and to give him a chance in Australia.
42. The Tribunal does not accept the applicant's claim the provision of adverse information was unintentional. The Tribunal notes that the applicant has utilised at least two aliases and admitted at the hearing it was for the purpose of breaching Australian immigration law. The fact that the false information supplied in his 309/100 Partner visa application pertained to basic information such as his name, his employment record and his residence suggests that there was a deliberate intention to mislead the Department. The Tribunal notes the applicant's failure to disclose to Australian immigration authorities such instances as his travel to Australia in 2005 under a false passport and his subsequent application for other visas. The Tribunal acknowledges the applicant conceded at the hearing that the utilisation of false information in his migration applications was not acceptable but given the widespread and multiple examples of the provision of false and misleading information gives the concession little weight. The Tribunal considers the applicant is very experienced and well versed with the requirements of the Australian migration system. According to the decision record he first arrived in Australia in 1998 and by the time he applied for his 309/100 Partner visa application he had considerable history with the migration system. The Tribunal finds the claim that the provision of false and misleading information was unintentional – especially given it pertained to such basic yet fundamental issues such as his true identity – as implausible. The Tribunal asked the applicant why he stated he had been in China since 2005 in his interview with Departmental officers in 2011. He replied it was because he was quite nervous. The Tribunal accepts there may be a degree of stress for applicants in an interview situation with the Department. It does not however accept that such anxiety precipitates the supply of such blatantly untrue information pertaining to which country you have been residing in. The Tribunal considers the applicant has illustrated a significant history in providing information that is false or misleading. The Tribunal does not accept his claim the false or misleading information he provided was unintentional and subsequently rejects this claim as a compassionate or compelling reason to exercise the waiver under PIC 4020(4).
43. The Tribunal noted from the applicant's previous written submission to the Department the claim the applicant was deprived of his review rights with his subclass 309/100 Partner visa application. The Tribunal asked the applicant and his representative to elaborate on this claim. Neither were able to provide any further insight into the claim. The Tribunal stated it would consider any further information that was subsequently provided post-hearing. At the time of decision none had been provided. The Tribunal notes that according to the delegate's decision the applicant did avail himself of his review rights, seeking review of the

delegate's decision to cancel his 309/100 Partner visa with the MRT who affirmed the delegate's decision. The applicant could have sought further review through the Federal Circuit Court if he desired and if not satisfied could have then sought further judicial review via the Federal Court. The applicant chose not to do so and instead on the evidence in the decision record lodged a new on-shore 820/801 Partner visa application just three weeks after the cancellation of his 100 Partner visa was affirmed by the MRT. The Tribunal considers further appeal rights had been available to the applicant and gives the claim as originally outlined in his 2016 written submission to the delegate no weight. The Tribunal considers the claim is neither a compelling or compassionate reason for the Tribunal to exercise the waiver under PIC 4020(4).

44. The applicant has been married since 1988 and has three children. His wife and two of the children gave evidence at the Tribunal hearing. The Tribunal has considered the issue of dependency and whether any dependency the applicant's wife and children have upon the applicant is a compassionate or compelling reason to justify the waiver of the PIC 4020 requirements.
45. The Tribunal noted that the applicant in 2016 stated that his children were dependent upon him financially and his youngest daughter was still studying. He also stated that his wife had not worked from the beginning of 2016 and without him they would not be capable of meeting their financial obligations.
46. At the hearing the applicant stated his three children were now all independent and married with the youngest being [age] years of age. He said his eldest child was in China. The applicant claimed that two of his children, whilst married, continued to live with him and his wife at their [property].
47. The applicant stated that his wife was not working. He said she had previously worked [but] was no longer physically fit and capable of doing so after a number of medical issues and a haemorrhage. The applicant stated he was working five days a week plus [shifts], earning around [amount] a year.
48. The Tribunal accepts the applicant's evidence that he is living with his wife, two of his children (and a grandchild) and his son in law. The Tribunal accepts the oral testimony of the applicant, his wife, children and daughter in law that gave oral testimony at the hearing that they are a close family. The Tribunal accepts the evidence that the applicant is working full-time [and] is an important financial contributor to the household, including in servicing the mortgage on their property which is in the names of the applicant and his wife.
49. The Tribunal does not consider these are compassionate or compelling circumstances that justify the waiver of PIC4020 and the granting of the visa.
50. The applicant stated in his oral testimony that his children are all now 'independent'. Whilst two of his children still reside with him, they are married and each 'partnership' has at least one party that is in paid employment. The Tribunal does not consider on the evidence before it that they rely on the applicant for financial support. The applicant's third child is in China and there is no claim or evidence that they currently rely on the applicant for financial support. The children confirmed in their own oral testimony that they and their partners help pay some of the living costs at the [property]. The Tribunal notes that the applicant claims to cover the mortgage repayments himself. The Tribunal is not satisfied that the applicant's children and their in-laws that reside at the property and are in gainful employment would not be able to make a contribution to the mortgage should the applicant's visa be refused. The Tribunal accepts there will be a degree of increased hardship without the applicant's income. The Tribunal does not consider the hardship to be onerous to the point where it represents a compelling or compassionate reason to exercise the waiver. The Tribunal also notes that the

applicant's children are Australian permanent residents with the ability to avail themselves of various government, welfare and community support if necessary. The applicant himself has stated his children are all now independent. Given their independence, the Tribunal does not consider the applicant's children and any financial reliance they may retain on their father the applicant represents a compelling or compassionate reason to exercise the waiver of PIC 4020.

51. The Tribunal has considered the reliance of the applicant's wife for financial support and the claim that she is unable to support herself financially. The Tribunal has considered the documentary evidence provided by the applicant post-hearing of various utilities bills, insurance bills, bank statements and mortgage repayments (T1, Folio.43-69) of the applicant's financial contribution to the household. The Tribunal notes the claims in oral testimony by the applicant and his wife that she is unable to work to earn income and has not done so for some years due to her health. The sponsor in her own oral testimony stated she wanted the applicant to stay as she relied on him due to her physical condition. She stated she had not worked since July 2016. The applicant's children also raised their concerns relating to their mother's health and stated she had had an operation in recent years. The Tribunal asked the applicant for any medical evidence confirming the claims relating to his wife the sponsor's health precluding her from employment but none has been provided that specifically states she is unable to seek or remain in employment. The Tribunal nevertheless accepts that there will be some financial hardship to the applicant's wife in the absence of the applicant. His income clearly is important to the household, particularly in regard to their mortgage. The Tribunal however notes that the applicant's two children and their married partners are also residing at the property. At least some of the parties are in gainful employment and there is opportunity for them to make a more significant contribution to support the sponsor – their mother or mother-in-law - financially. Her son [in] oral evidence stated he would help support his mother if the applicant had to return offshore. The Tribunal furthermore notes that the applicant's wife is an Australian citizen. She claims in oral evidence to currently not receive any government benefits or support. If she has financial – or indeed health issues as claimed - she can access a range of government financial assistance and support if she is unable to work and support herself. The Tribunal furthermore notes that there is a range of government, community and charity that would be available as well as family support. The applicant can furthermore provide financial support to his wife from offshore should he gain employment again in China. The Tribunal accepts that there will be a degree of financial hardship to the applicant's wife the sponsor due to a reduction in household income from the applicant's absence. The Tribunal however considers that these losses can be mitigated through her ongoing live-in family members (who the Tribunal notes currently claim not to contribute to the mortgage), through government assistance and through a reasonable modification of lifestyle and living standards by the applicant's wife the sponsor. The Tribunal appreciates the hardships caused by a mortgage and accepts that the continued maintenance of such a mortgage may ultimately be a question for the applicant, sponsor and their children to consider. The Tribunal however notes that the applicant and sponsor became involved in serious financial dealings (taking out a mortgage) in the knowledge of the potentially precarious visa status of the applicant and the knowledge (at least from the perspective of the applicant) that he had provided false or misleading information to the Department in his 309/100 Partner visa application. The Tribunal accepts the current reliance of the sponsor on the applicant and her personal situation in regard to her finances and her health may potentially have represented compassionate circumstances that affect the interests of an Australian citizen. Having had regard to the circumstances however to the potential financial hardship, the circumstances of this hardship and the possibility of mitigation, the Tribunal does not consider these circumstances justify the waiving of the requirements of PIC 4020. Upon weighing up these matters, the Tribunal does not consider the reliance of the applicant's wife on the applicant for financial support – or indeed support for her current claimed health

conditions are matters that 'justifies granting the visa' and waiving of the PIC 4020 requirements.

52. The Tribunal noted from the decision record the applicant had previously raised with the delegate concerns pertaining to the safety of his wife in China. The Tribunal noted the claim in his written submission to the delegate that the applicant's wife had previously been granted a Protection visa and if she felt compelled to return to China with the applicant she may face threats to her safety due to her Catholic faith.
53. The Tribunal asked the applicant if his wife had returned to China since the granting of a Protection visa to her. He stated she had. He told the Tribunal she had been three to four times last year for family-related issues and normally travels once a year. Given the numerous times the applicant's wife has returned to China without problem, and the lack of any other corroborative evidence of some threat to his wife should she return to China, the Tribunal gives the claim no weight. The Tribunal furthermore notes that the applicant's wife, an Australian citizen, is not compelled to return to China with the applicant. Any return is a judgement call for her to make. The Tribunal accepts the applicant's wife would prefer he stay in Australia but does not consider any claimed safety issues she faces in China is either a compelling or compassionate reason for the Tribunal to exercise the waiver of the PIC4020 requirements.
54. The Tribunal has considered the testimony of the applicant's children and his daughter-in-law who expressed concerns for their mother the sponsor and wife of the applicant. The applicant's daughter [stated] she was concerned for her mother's physical and mental condition as her mother was reliant on her father. Her daughter in law stated that the sponsor needed looking after and she and the applicant supported each other emotionally. The Tribunal accepts the applicant and sponsor provide each other with emotional support. The Tribunal accepts there will be a degree of hardship if the applicant was to return offshore but the Tribunal does not consider this to be a compelling and/or compassionate reason to waive the PIC4020 requirements. The sponsor is residing with her children and her son and daughter in law who provide her with emotional support and assistance. She will retain contact with the applicant in China through modern communications technology and, whilst acknowledging the increased financial hardship, has the potential to visit the applicant in China through the financial assistance of her cohabitating family if they so desire.
55. The Tribunal notes that the applicant through his submissions previously submitted that the fact he owned an Australian company that supported three Australian permanent residents was a compelling reason for the exercise of the waiver of PIC 4020. The applicant had claimed in 2016 that his departure from Australia would cause his business to close down and his employees to lose their jobs. The applicant at the hearing stated that his company had been closed over the last two years. He said that it had run at a loss and was now closed. He stated he does not employ anyone anymore and instead is in the employ of someone else. Given this development, the Tribunal rejects the claim his business and the impact on employees were compassionate and/or compelling reasons for the Tribunal to exercise the waiver of PIC4020.
56. The applicant has previously raised his genuine relationship with the sponsor, his wife, as a compassionate and/or compelling reason to exercise the waiver. The applicant stated he had been in a relationship with the sponsor for 33 years. The sponsor stated that they had married in 1988. The Tribunal accepts the applicant is in a genuine and continuing relationship with the sponsor and has been for many years. The Tribunal accepts that the applicant and sponsor have built a genuine, loving and happy family with three children and now a grandchild. The genuineness of their relationship and their commitment to each other and their family is not in dispute. The question for the Tribunal to consider is does this constitute a compelling and/or compassionate reason to exercise the waiver. The applicant

said the sponsor could not travel with him to China as the bulk of their family was in Australia. He said some siblings remained in China but most of their family was in Australia. The Tribunal has considered the claim. The Tribunal gives their relationship significant weight in its considerations but ultimately it does not consider these to be compelling or compassionate circumstances. The Tribunal acknowledges a refusal to exercise the waiver of PIC4020 will cause both the sponsor and the applicant emotional hardship on top of the financial hardship previously discussed. The Tribunal nevertheless considers the hardship can be mitigated. The applicant and sponsor can remain in contact via telephone and an array of social media to provide each other with emotional support. The sponsor lives with her children and their families and they can provide her with emotional support. Whilst the Tribunal has recognised the sponsor faces a degree of increased financial hardship without the applicant's salary in Australia, the Tribunal notes that given her cohabitating children and their families are in some cases working and they may be able to provide a degree of financial support to the sponsor to travel to China to visit the applicant. The Tribunal furthermore, noting her multiple return trips to China, does not on the evidence before it consider she is in any danger should she return to China. The Tribunal accepts its decision not to exercise the waiver on the basis of the applicant's genuine and long-term relationship with the sponsor is difficult for both parties. Having had regard to those circumstances, the Tribunal does not however consider the hardship of the physical separation of the applicant and sponsor constitutes a compassionate or compelling circumstance that justifies the waiver of requirements of PIC4020 and 'granting the visa'.

57. The Tribunal noted from the decision record that the applicant had previously lodged a Protection application which had been rejected by the delegate and the decision then affirmed by the Tribunal. The Tribunal noted the applicant had previously stated in his written submissions to the delegate that he may face threat or feel unsafe if he has to return to China due to his faith. The applicant said at the hearing he wanted to tell the Tribunal he couldn't go back to China and he talked about issues with personal safety. The Tribunal notes from the decision record the applicant provided that the Protection application had been refused by the delegate and affirmed by the Tribunal some years ago. Despite his stated fears, the applicant at the hearing stated that he has returned to China three times since his arrival in Australia whilst his wife travels every year including three to four times last year. The applicant presented the Tribunal no further or new information in support of his previous Protection applications. The Tribunal accepts that the applicant and his wife are Catholics but in the absence of any corroborative evidence or claim of any specific threat to his safety gives the claim no weight. The Tribunal does not consider the applicant's previously rejected claims to feel unsafe in China to be compelling and/or compassionate reasons for the Tribunal to waive the PIC4020 requirements.
58. The Tribunal notes that the applicant has illustrated substantial, persistent and ongoing disregard for Australia's migration laws. The Tribunal considers his disregard for Australia's laws is considerable and his propensity to utilise false documentation, aliases and then brazenly attempt to mislead and deceive Australian immigration officials in his Subclass 309/100 Partner visa is indicative of someone with little respect for our immigration system. The Tribunal notes his claim his behaviour to have been unintentional. The Tribunal does not accept this claim. The Tribunal notes from his oral testimony that he claims he only paid off the \$9,000 of debts owing to the Commonwealth after receiving notice his 309/100 Partner visa would be cancelled. The Tribunal considers this suggests his attempt to regularise his status was motivated by saving his visa rather than meeting his legal obligations to the Commonwealth. The Tribunal considers his delinquent migration history to be extensive and, whilst conceding not exercising the waiver will have an adverse impact emotionally and financially on the applicant and his wife the sponsor, the Tribunal does not consider the circumstances that have been put forward to the Tribunal by the applicant to be compelling and/or compassionate reason for the Tribunal to waive the PIC4020 requirements under PIC4020 (4).

59. The Tribunal has formed the view that the migration fraud that has been committed by the applicant over many years is both considerable and serious. The Tribunal notes the applicant appears to have exhibited a complete disregard for Australia's migration laws on multiple occasions. He has exhibited a propensity for breaching our laws numerous times by utilising false passports, false identities and blatant untruths, most recently in his Subclass 309/100 Partner visa application where the deception drilled all the way down to such basic questions as name, occupation and residence. The deliberate attempt in his Subclass 309/100 Partner visa application to both withhold information and mislead Departmental officers as to his immigration history cannot be explained as inadvertent as he has claimed. The applicant has made some remarks about being remorseful for his behaviour but, given his delinquent migration history and his repeated willingness to ignore Australian migration law, gives such pronouncements no positive weight.
60. The Tribunal has some sympathy for the applicant's children in the circumstances and, given the sponsor's claimed reliance on the applicant both financially and emotionally, has some for his wife. The Tribunal considers the sponsor's reliance on the applicant for financial support (particularly given the mortgage which is in the names of both parties) and given the claims pertaining to her health could represent a compassionate circumstance affecting an Australian citizen that justifies waiving the PIC 4020 requirements under PIC 4020(4). The Tribunal nevertheless strongly believes this requirement should not be waived having had regard for the circumstances in this review.
61. Based on the evidence before the Tribunal, the Tribunal is not satisfied that there are compelling circumstances that affect the interests of Australia; or compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen that justify the granting of the visa. The Tribunal has considered the evidence presented by the applicant and the evidence of his witnesses and does not consider that these requirements should be waived under PIC 4020(4).
62. Therefore the Tribunal finds the requirements of PIC 4020(1) should not be waived. On the basis of the above, the applicant does not satisfy PIC 4020 for the purposes of cl.820.226.
63. Having concluded that the applicant does not meet PIC 4020 the Tribunal finds no evidence that the applicant meets the criteria for any other subclass within the class of visa sought.

DECISION

64. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Justin Owen
Senior Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s.5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...